In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 634

JOHN FREDERICK WEERSING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1969. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to September 22, 1969. The petition was filed on September 23, 1969, and is thus out of time under Rule

22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for failure to comply with an induction order, the government was required to prove affirmatively that petitioner had not been called out of turn, where his Selective Service file containing the induction order was admitted into evidence by stipulation and the defense raised no such issue at trial.

STATEMENT

After a jury-waived trial, petitioner was convicted in the United States District Court for the Central District of California of refusing to be inducted into the Armed Forces, in violation of 50 U.S.C. App. 462. On May 27, 1968, he was sentenced to three years' imprisonment. The court of appeals affirmed.

The government's evidence consisted of petitioner's Selective Service file, admitted into evidence by stipulation (2 R. 4-5).[1] The file showed that petitioner, born in October 1942, registered with the Selective Service System in 1960, and was thereafter granted student deferments in 1963, 1964 and 1966 (SSF 16-37; 2 R. 14-15). After completion of his post-graduate studies, petitioner took a position with a

[1] "R." preceded by the volume number refers to the two-volume record on file with the Clerk of this Court. The trial transcript is contained in volume two, with petitioner's Selective Service file (herein referred to as "SSF") included as an exhibit.

municipal government as a city planner (SSF 37). On September 7, 1966, he was found qualified for induction (SSF 61). In June 1967, he was ordered to report for induction (SSF 154). On August 29, 1967, petitioner reported, was reexamined and found fit for military service, but refused induction (SSF 63, 79-81).

At trial, petitioner was represented by counsel of his own choice who had twenty-four years of legal experience and some familiarity with Selective Service cases (see 2 R. 58). The issues raised at trial were the handling of petitioner's claims for deferment and exemption (2 R. 14-23).[2] Petitioner did not raise any claim at trial that his induction order was invalid or not issued in conformity with the order-of-call provisions of 32 C.F.R. 1631.7 (set out at Pet. App. 12-13).

ARGUMENT

As noted previously, the petition is out of time. In any event, the case does not warrant further review. The trial court had offered to it, by way of stipulation, petitioner's Selective Service file which contained his induction order (SSF 154). There being no objec-

[2] In addition to his student deferments, petitioner later requested but was denied special status sought on other grounds. In August 1966 he requested but was denied an occupational deferment. In June 1967, after being ordered to report for induction, he claimed to be a conscientious objector. He was denied this exemption (SSF 44-47, 83-93, 99, 104, 113, 124-132, 139-153). No question is now raised concerning the denial of conscientious objector status. This issue is fully treated in the opinion below (Pet. App. 7-8).

tion to the validity of this order, the trial court acted well within its discretion in determining that the order in the file was competent proof of what it purported to be. *Parrott* v. *United States*, 370 F. 2d 388 (C.A. 9), certiorari denied *sub nom. Lawrence* v. *United States*, 387 U.S. 908.[3]

Nor, in this factual setting, was it improper for the court of appeals to rely on a presumption of administrative regularity to the effect that registrants are ordinarily called in proper sequence as required by the pertinent administrative regulation—32 C.F.R. 1631.7. Whatever may be the differences in theoretical approach, as petitioner recognizes (Pet. 14), the courts of appeals are in harmony that, absent an issue regarding the order of call being raised at trial, it may be assumed on appeal that registrants were called in proper order. See, *e.g.*, *United States* v. *Sandbank*, 403 F. 2d 38 (C.A. 2), certiorari denied, 394 U.S. 961; *Yates* v. *United States*, 404 F. 2d 462 (C.A. 1), rehearing denied, 407 F. 2d 50, certiorari denied, 395 U.S. 925.[4] Indeed, since petitioner fit into the "non-volunteer" category (SSF 137) and was almost twenty-five[5] years old at the time of his

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[3] Petitioner now contends that this issue was raised in his motion for a judgment of acquittal (Pet. 5-6). This motion, however, made no reference to the issue, and no question as to the validity of the induction order was raised at trial.

[4] See also the cases cited in our brief in opposition in the *Yates* case, No. 1731 Misc., 1968 Term, a copy of which we are providing to counsel for petitioner.

[5] Under 32 C.F.R. 1631.7, the oldest non-volunteers, between the ages of 19 and 26, are required to be selected first within

refusal, the possibility that he was called out of sequence is remote. He was deferred from 1963 to 1966 and was not ordered to report until August 1967; it thus seems apparent that his call-up was not accelerated. No reason is suggested by petitioner why this Court should now give plenary review to an issue which it recently refused to consider in the *Sandbank* and *Yates* cases.

From the absence of an entry on August 11, 1967, on petitioner's cover sheet, he reasons that this omission signifies an administrative irregularity connoting that the local board failed to meet and select petitioner for induction (Pet. 20-21). The cover sheet (SSF 13-14) shows, however, that, on June 20, 1967, petitioner was selected by the presumptively valid action of his Pasadena local board, for induction on July 5, 1967. At petitioner's request and for his convenience his file was forwarded to San Diego so he could report for induction in that area (SSF 13, 137). This transfer, accomplished on July 12, 1967, necessarily had the effect of delaying the induction planned for July 5. Since the cover sheet notation read "Transfer Board No. 139 San Diego for Jul 5 1967 Induction," it was obvious that the San Diego board was to call up petitioner as soon as practicable. He was not entitled to any reexamination of his file or reconsideration by the transferee board, but only to information regarding his reporting date in the San Diego area. This he had already

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that category, after delinquents and volunteers (see Pet. App. 13).

received, however, incident to his June selection by the Pasadena board[6] (SSF 154).

CONCLUSION

For the reasons stated, it respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
EDWARD FENIG,
Attorneys.

OCTOBER, 1969.

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[6] There is thus no conflict here with the earlier decision of the Ninth Circuit in *Brede* v. *United States*, 400 F. 2d 599, 600, modifying 396 F. 2d 155. In *Brede* I, the Ninth Circuit had held that an order to report for civilian work assignment issued by a clerk was not a board "order". In *Brede* II, the Court amended its opinion to make clear that the order to report could be made contingent on later authorization at a board meeting. Here, as shown above, the board, and not the clerk, selected petitioner for induction. Moreover, as the court below pointed out, the issue in *Brede* was raised by motion for judgment of acquittal (see Pet. App. 3, n. 4). Here, as noted, no issue regarding the matter of proper selection was raised until the case was on appeal.

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